No. 93-1079

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

MITCHELL LEE PRICE

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR MITCHELL LEE PRICE IN OPPOSITION

ARTHUR W. RUTHENBECK
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QUESTION PRESENTED

Whether the petitioner has a right under the Due Process Clause to collaterally attack prior state convictions used to enhance his sentence under the Sentencing Guidelines.

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OPINION BELOW

The memorandum decision of the Court of Appeals (Pet. App., 1a-3a) is unpublished, but the judgment is noted at 999 F.2d 545 (Table). The order of the district court denying respondent's motion to exclude his prior convictions (Pet. App., 4a-6a) is unpublished.

JURISDICTION

The judgment of the Court of Appeals was entered on July 16, 1993. A petition for rehearing was denied on October 7, 1993. (Pet. App., 7a) The petition for a writ of certiorari was filed on January 3, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

On December 10, 1990, Mr. Price, the respondent, robbed the Wells Fargo Bank in

Bakersfield, California, of $247. (PSR 2, Paragraph 5) On March 11, 1991, he pleaded guilty to the indictment charging him with bank robbery, pursuant to a plea agreement. (CR 11, 10)

Prior to sentencing a presentence report was prepared to assist the district court. In that report it was alleged that the respondent had pleaded guilty to an assault with a deadly weapon charge on June 9, 1981 and to three counts of burglary on February 9, 1984. Both pleas were entered in Kern County, State of California, Superior Court. (ER[1] 33) Based on these convictions the presentence report recommended that the respondent's sentence be enhanced under the United States Sentencing Commission Guidelines section 4B1.1, as a "career offender." (PSR 5, Paragraph 5)

The respondent filed a motion, prior to sentencing, to strike the use of his prior convictions on the grounds that they were constitutionally invalid. (ER 32-39) In the respondent's motion to strike he alleged, in general, his objections to the two prior pleas and requested an evidentiary hearing so that he could provide further evidence as to the invalidity of the pleas pursuant to Ninth Circuit law in *United States v. Carroll*, 932 F.2d 823 (9th Cir. 1991) (ER 3) As to the first prior plea, assault with a deadly weapon, the respondent alleged that the plea was not "knowing and voluntary" and that the respondent wished to present evidence at a hearing that he, in fact, believed he was pleading to a misdemeanor offense. This belief was supported by the state court record that was attached to his motion. (ER 34-36, 53-57) As to the second plea the respondent presented proof that no advisement of his constitutional rights was set forth on the record and requested that he be granted an evidentiary hearing to show the plea was constitutionally invalid. (ER 36-37, 38-39)

The petitioner filed objections to the respondent's motion to strike arguing that 1) the prior

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[1]"ER" refers to the Court of Appeal Excerpts of Record filed by the respondent.

convictions could not now be challenged as no prior ruling that they were unconstitutional had been obtained, and that 2) the respondent had failed to "prove by a preponderance of the evidence that the convictions were unconstitutionally obtained." (ER 44-47) The responded filed a response to the petitioner's opposition reaffirming his request for an evidentiary hearing to meet the second objection of the petitioner. (ER 51)

At sentencing the district court ruled that the November 1, 1990 change in the guideline adding the "'previously ruled ... guage means that a defendant may no longer lodge a constitutional challenge against a prior conviction for the first time at the sentencing stage." (ER 2) Based on this ruling the court did not reach the issue of whether the respondent was entitled to an evidentiary hearing. (ER 66-67) The respondent was thereafter sentenced to a term of imprisonment of 236 months, to be followed by a five-year term of supervised release. (ER 14-16)

The Court of Appeal, relying on its then recent decision in *United States v. Vea-Gonzales*, 986 F.2d 321 (9th Cir. 1993), reversed and remanded the case to the district court to give the respondent an "opportunity to collaterally attack his prior convictions that will be used against [him] at sentencing." (Pet. App. 2a) Thereafter the government's requests for rehearing and rehearing en banc were denied. (Pet. App. 7a)

REASONS FOR DENYING THE PETITION

A. THIS COURT'S PRIOR DECISIONS REQUIRE THAT DEFENDANTS BE GIVEN THE OPPORTUNITY TO COLLATERALLY ATTACK CONSTITUTIONALLY INFIRMED PRIOR CONVICTIONS WHICH WILL BE USED AGAINST THEM AT SENTENCING.

The petitioner does not challenge, wisely so, that the Constitution requires collateral review of prior convictions used for sentencing. They only seek to limit the challenging of prior convictions

to challenges on the "grounds of complete denial of counsel or similarly fundamental constitutional error." (Pet. 7) An analysis of this Court's decisions fails to support the petitioner's interpretation and supports the challenge of any constitutional infirmities in prior convictions.

An analysis of this Court's decisions must begin with the 1967 decision in *Burgett v. Texas*, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967). In that decision the petitioner challenged a prior conviction used against him in state court because he had been denied his right to counsel. The Court held that:

> "To permit a conviction obtained in violation of *Gideon v. Wainwright* to be used against a person either to support guilt or enhance punishment for another offense (*see Greer v. Beto*, 384 U.S. 269, 86 S.Ct. 1477) is to erode the principle of that case." *Id.* at 115

To prevent further erosion of the petitioner's 'specific federal right', in this case the right to counsel, the Court reversed the state court conviction. The Court established the principle that where a 'specific federal right' is denied in the prior conviction used to support guilt or enhance punishment, the court will not allow the use of the prior conviction to erode that right.

In *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) this court established 'specific federal rights' in the taking of guilty pleas. This Court found a 'specific federal right' in determining that a plea is voluntarily made. The court also noted 'specific federal rights' involved in the waiver that takes place when the plea is entered including the privilege against self incrimination, right to trial by jury, and the right to confront one's accusers. The Court further stated that to avoid collateral proceedings attacking convictions, courts should "conduct an on the record examination of the defendant which should include, inter alia, an attempt to satisfy itself that the defendant understands the nature of the charges, his right to a jury trial, the acts sufficient to

constitute the offenses for which he is charged and the permissible range of sentences." *Boykin*, 395 U.S. at 244 note 7, 89 S.Ct. at 1713 note 7.

In 1972 this court further visited these issues when it decided *United States v. Tucker*, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972). In *Tucker* this court held that use of a prior conviction to enhance "a sentence founded at least in part upon misinformation of constitutional magnitude" was error. 404 U.S. at 447, 92 S.Ct. at 592. *Tucker* reaffirmed the rule in *Burgett* that to prevent the erosion of constitutional rights, constitutionally infirmed convictions cannot be considered to support guilt or enhance punishment.

Burgett and *Tucker* require collateral attacks of prior convictions premised on any constitutional infirmity. Allowing such attacks is the only way to assure "that an unconstitutional conviction could not be used again and again to cause still more harm to the person upon whom it was first visited." *United States v. Vea-Gonzales*, 999 F.2d 1326 (9th Cir. 1993)

The respondent's view of the constitutional requirements which limit collateral review of prior convictions on grounds of 'complete denial of counsel or similarly fundamental constitutional error' finds no support in the case law. For example what is a "complete denial of counsel?" Are there varying degrees of the right to counsel? No such concept is present in the case law. Further, what is "fundamental constitutional error?" No case discusses the concept of what is or is not fundamental error and of course the respondent cites none for this proposition.

The only case cited by the respondent is *Chapman v. United States*, __ U.S. __, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991). In the quotation cited by the respondent (App. 7) they should have included the full quotation as follows:

"Every person has a fundamental right to liberty in the sense that the Government

> may not punish him unless and until it proves his guilt beyond a reasonable doubt at a criminal trial conducted in accordance with the relevant constitutional guarantees. [cite omitted] But a person who *has* been so convicted is eligible for, and the court may impose, whatever punishment is authorized by statute for his offense, so long as that penalty is not cruel and unusual, [cite omitted] and so long as the penalty is not based on an arbitrary distinction that would violate the Due Process Clause of the Fifth Amendment." *Id.* at 1927.

Chapman makes clear that a defendant may not be sentenced on a conviction that is constitutionally infirmed. Only after the lack of constitutional infirmity is established may a court impose the punishment authorized by law.

The petitioner's reliance on *United States v. Timmreck*, 441 U.S. 780, 99 S.Ct. 2085, 60 L.Ed.2d 634 (1979) and *Halliday v. United States*, 394 U.S. 831, 89 S.Ct. 1498, 23 L.Ed.2d 16 (1969) are similarly misplaced. In both *Timmreck* and *Halliday* a constitutional claim against the prior conviction was not made. Therefore, no collateral attack was allowed.

In *Timmreck* the court held that "such collateral relief is not available when all that is shown is a failure to comply with the formal requirements of [Rule 11]." *Supra* at 785. The challenge in *Timmreck* was to a collateral consequence of the plea, i.e., that the defendant was not informed of the three-year minimum mandatory parole term, wherein he did not argue that he was, in fact, unaware of the term or that if he had known of the term he would not have plead guilty. Such a challenge does not involve constitutional infirmity but merely a technical violation of Rule 11 and is not allowed collaterally.

Similarly, in *Halliday* the defendant's claim was solely a technical violation of Rule 11 and therefore the court would not allow a challenge to the prior conviction on that ground prior to the Court's decision in *McCarty v. United States*, 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969) In both *Halliday* and *McCarty* the Court "took care to note that the holding was based solely on the

application of Rule 11 and not upon constitutional grounds." *Halliday, Supra* at 832.

The principles set forth in *Burgett* and *Tucker* are still valid today and firmly establish that prior convictions may be challenged collaterally when constitutional infirmity is established. The constitutional violations that may occur in a guilty plea are set forth in *Boykin* and a violation of any of those rights may result in collateral attack of the prior conviction and result in the court not considering them to support guilt or to enhance punishment.

B. THE RESPONDENT SHOULD HAVE BEEN GIVEN AN EVIDENTIARY HEARING ON HIS MOTION TO STRIKE THE PRIOR CONVICTION AND UNTIL HE HAS A FULL HEARING ON WHAT CONSTITUTIONAL INFIRMITIES WERE PRESENT IN HIS PRIOR CONVICTIONS THIS COURT SHOULD DENY THE PETITION.

Because the district court held that the United Sentencing Commission Guidelines gave him discretion to permit a collateral attack and he declined to exercise that discretion the respondent was never given a change to fully present his constitutional challenges at an evidentiary hearing. Without a hearing to set forth his challenges this Court would now be unable to decide whether the respondent presented a constitutional infirmity to the convictions.

When the respondent made his motion to challenge the convictions, he specifically requested an evidentiary hearing to present his claims. Under Ninth Circuit law the respondent is entitled to establish the constitutional invalidity of the prior conviction through testimony at an evidentiary hearing. *United States v. Carroll*, 932 F.2d 823, 825 (9th Cir. 1991) The respondent in his motion specifically made a request for an evidentiary hearing to present evidence of the constitutional invalidity of the convictions.

The respondent in his motion set forth that his plea to the assault was constitutionally infirmed due to it not being knowing and voluntary because he was under the belief that he was

pleading to a misdemeanor offense. The transcript of the plea supported that conclusion. His moving papers established that a constitutional claim was alleged, i.e., that the plea was not knowing and voluntary. The respondent should be allowed to present evidence of his knowledge of the effect of his plea and whether he would have pled guilty if he had known the conviction was for a felony. The respondent should be allowed to further articulate his claim by presenting testimony before this court rules on the merits of the government's petition for certiorari.

As to the burglary convictions the respondent established that no record existed as to what occurred at the plea. He was entitled to present evidence at the hearing to show what constitutional rights were violated. This court would be premature in denying respondent's claims without a full hearing before the district court.

Therefore, until the respondent is allowed an evidentiary hearing to make his claims this court should deny the petition.

CONCLUSION

The petition for a writ of certiorari should be denied because the respondent is entitled to challenge his prior convictions for any constitutional infirmities and he should be allowed an evidentiary hearing to establish what constitutional infirmities he is alleging.

Respectfully submitted.

ARTHUR W. RUTHENBECK
Federal Defender, Eastern District of California

ROBERT W. RAINWATER
Assistant Federal Defender

APRIL 1994

CERTIFICATE OF SERVICE

UNITED STATES OF AMERICA, Petitioner, v. MITCHELL LEE PRICE, Respondent.	No. 93-1079

The undersigned hereby certifies that he/she is an employee in the office of the Federal Defender for the Eastern District of California and is a person of such age and discretion as to be competent to serve papers. On March 31, 1994, I personally served a copy of the attached:

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

by placing said copy in a postpaid envelope addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es), and by depositing said envelop and contents in the United States mail at Fresno, California, as follows:

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530

DATED: March 31, 1994

Margaret S. Camacho